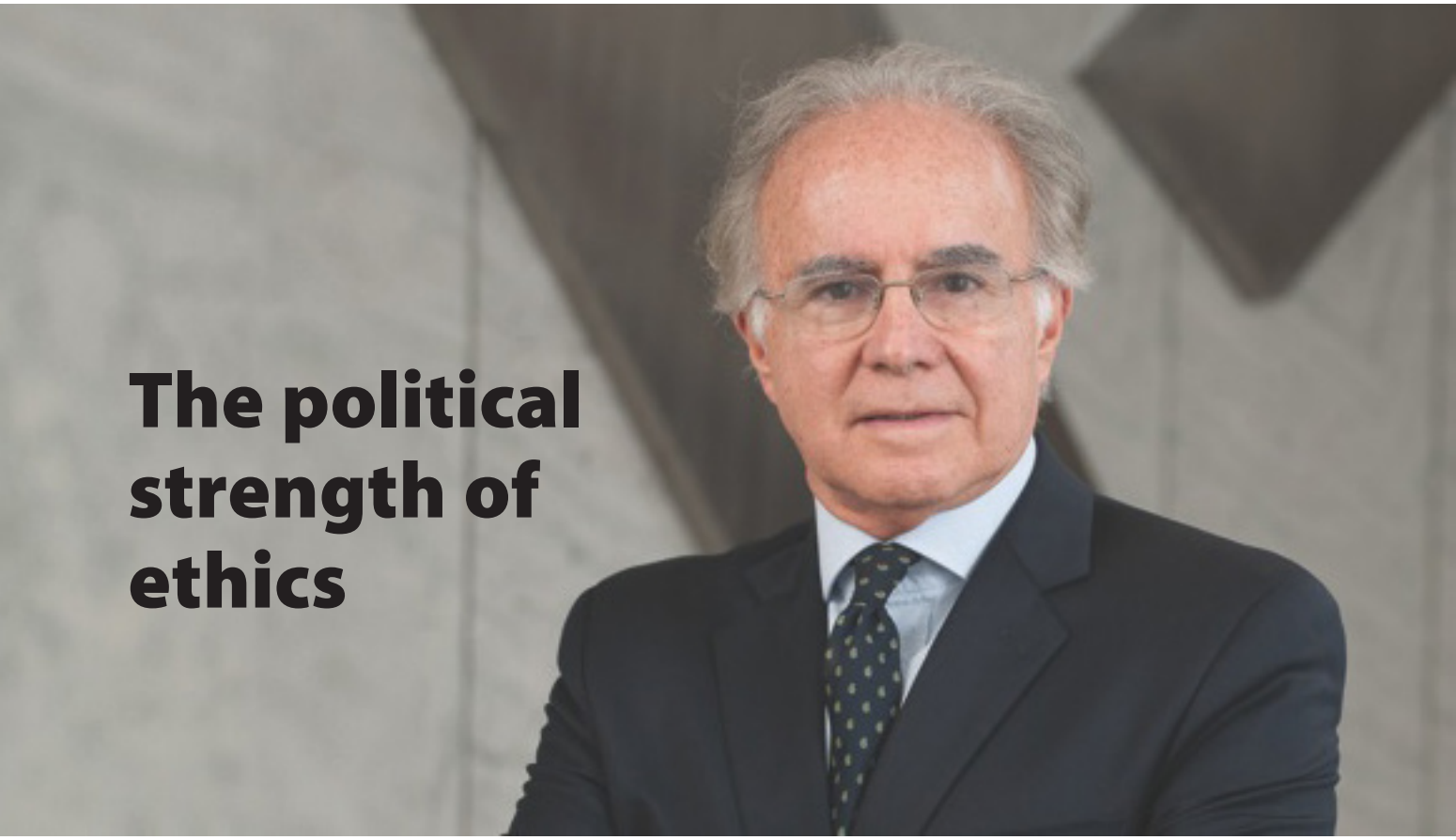
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The political strength of ethics

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THE LAW SCHOOL OF FGV Rio in August published the results of a major study of the Brazilian Supreme Court. Law School Dean and Professor Joaquim Falcão was a member of the National Council of Justice* from June 2005 to June 2009 and earlier earned an LLM from Harvard Law School. Here he explains the implications of the Supreme Court conviction of government officials involved in the congressional vote-buying scheme and discusses how the court is now perceived. He also believes that last year's street protests did not want political reform but better public services, "because the new citizen is not the worker. He is the consumer, a consumer of public services and regulated services." Falcão says the Supreme Court has stopped discussing "abstract legal doctrines and began to address actual social problems." He adds that "what unfortunately it has failed to address are the economic issues related to past economic plans."

*The National Council of Justice is an agency of the Brazilian Judicial System created in 2004. The 15-member Council is headed by the Chief Justice of the Supreme Court. Among its responsibilities are ensuring that the judicial system remains autonomous, conducting disciplinary proceedings against members of the judiciary, and compiling and publishing statistics on the Brazilian court system.

***The Brazilian Economy*—The trial of government officials involved in the congressional vote-buying scheme was historic for its character and popularity. Two years later, how is it affecting the behavior of voters and the presidential candidates?**

***Joaquim Falcão*—**I never thought of the trial as something that would have electoral consequences but rather as an improvement of our democracy. What was the improvement? First, the Supreme Court was able to make a decision in a timely manner that responded to national interests. On trial were not only the defendants but also the Supreme Court itself. Society asked: Will the

Court be able to make a decision?

I thought of the trial as demonstrating what I call the political strength of ethics—not just the authority of ethics, but ethics as an instrument of integrity in public administration. Ethical misconduct is not exactly unique to Brazil. In recent years the chief justice of Spain, the president of Germany, the prime minister of Italy, President Sarkozy of France, high Chinese officials—they have all been accused of ethical misconduct. There is a pressure on the economic, political and legal system worldwide in favor of public integrity. In Brazil, this issue has greatly affected the Workers' Party (PT). It is not only an election issue. It is something much broader that affected the credibility of the PT government at the time.

"I thought of the (vote-buying) trial as demonstrating what I call the political strength of ethics—not just the authority of ethics, but ethics as an instrument of integrity in public administration."

Do we now have less tolerance for corruption?

Corruption is not an issue of one individual, one party, even one nation. The congressional vote-buying scheme involved more than the PT; it also had to do with relations between public and private institutions: Congress, political parties, businesspeople, banks, advertising agencies. The government alone does not cause corruption. The challenge in the trial of the vote-buying scheme was whether the Supreme Court would be able to recognize two basic challenges: the fairness of a trial that respects the rights of the defense yet at the same time the defense of public integrity. Convictions had to be seen as having been done in a legitimate way after all rights and defense appeals were exhausted. It was a fair trial. The trial broadcast removed any doubt. Society watched and also judged.

Did the trial improve the public image of the Supreme Court?

The judiciary does justice on behalf of the people. Although justices and judges cannot be replaced by the people, they represent the people as much as the executive and the legislature branches. Courts have to act in tune with the sense of justice of the people. ... If they are not in tune, they run the risk of increasing popular distrust of the magistrates, the institutions, and the Supreme Court. The Supreme Court has regained its lost legitimacy because it got closer to the people's interests. It has ruled on many issues, such as homosexual unions, drugs, freedom of the press, the racial quota system, among many others. It has stopped discussing abstract legal doctrines and moved on to confront the actual problems of Brazilians.

What the Supreme Court unfortunately has failed to address are economic issues related to past economic plans.[1] Chief Justice Joaquim Barbosa tried it but postponed it due to pressure from the executive branch and lobbying from banks. This is bad because when the Supreme Court does not face an issue, it prolongs a situation of legal uncertainty for

creditors and debtors and the business environment.

The Supreme Court has been ruling on issues that the legislature might ignore for political reasons. Is this an appropriate role for the Supreme Court?

The Constitution says that the powers are independent and harmonious among themselves. This is an ideal situation. But the reality is different; there is a permanent tension between the powers. … Democracy is the recognition of conflict and tension, and a nonviolent protocol to solve them.

Tension between executive, legislative, and judiciary is a reality. Often the Supreme Court takes the initiative and is more daring. The legislature can react but has not done so. It has allowed the Supreme Court to be more proactive. For example, in Congress there is no consensus on issues related to racial quotas or abortion. The churches lobby very strongly against abortion and those in Congress do not want to lose votes. … The drug issue is another example: It was excessive to classify drug users as drug dealers, a crime without bail. As a result the prisons are crowded. … Countries like Portugal, Uruguay, several states, the United Nations, all have said that the current war on drugs has failed. But if you propose any change to decriminalize or prioritize health in the fight against drugs in Brazil, the research shows that the public wants more repression. …

"Corruption is not an issue of one individual, one party, even one nation. The congressional vote-buying scheme involved more than the PT; it also had to do with relations between public and private institutions."

Congress does not want to lead on long-term reforms, which are incompatible with the short cycle of elections. This creates opportunities for other powers, such as the judiciary. It creates a space for more efficient legislation. There can be no vacuum in politics, and the Supreme Court advances.

What do you think about the Supreme Court decision to ban corporate donations to political campaigns and political parties?

We cannot analyze one type of funding alone, as was done with corporate donations to political campaigns. It is necessary to analyze campaign finance as a whole. There are several sources of funds: government fund, the parties, the candidate's own resources, individual voter donations, businesses, NGOs, foundations. One [source] cannot be banned without assessing the effects on campaign financing as a whole. Congress is responsible for reexamining campaign financing, but because members of Congress are afraid to change it, the issue ended up with the judiciary. The Supreme Court cannot change campaign financing as a whole, because it can only rule on the specific case submitted to it. I fear that if we ban only corporate donations, when we do not have a culture of individual donations to political campaigns, government funding will become absolute. I do not think it is good for the government to interfere

so much in political campaigns. We should consider a campaign financing system with a large variety of sources, competitive, transparent, and regulated. It would be better for democracy.

Do you think that society is prepared to participate in the discussion of political reform, as suggested by President Rousseff after the demonstrations of 2013?

At the time the protesters did not want political reform. Their issue was the quality of public services and corruption in public services. That is why the people went to the street. Against the transport lobby that knows no bounds. … Voters today want quality public services. They want safety, and health.

The situation is different in schools. Surveys show that parents are happy with the education given in schools, even if the quality in some schools leaves a lot to be desired. But they are not happy with safety, health, and public services—immediate issues that afflict the population, the everyday life of cities, which decides the vote.

What are the main conclusions of the FGV Law School study of the Supreme Court?

The study shows deviations in the Supreme Court's actual day-to-day performance. For example, the Supreme Court should be a collegial body. But over 90% of the decisions are individual, monocratic. These occupy the time of the justices. It also found that many of the decisions are based not on merit, but on procedural issues. … For example, the law says that if the justices ask to review a process, they should return it in 15 days. The average is over 300 days. … It is against the law.

Society provides everything to the justices of the Supreme Court: they have resources, they are well chosen, and society respects them. The justices have to be efficient, to act within the procedural rules, which sometimes they do not. Our data have not been disputed. On the contrary, they have been used by several justices to give new directions.

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Do delays in justice create injustice?

Delays in justice create legal uncertainty, which is conducive to injustice. Or to no justice at all. We did a study that classified the types of legal uncertainty. The most important is administrative, resulting from long processing time. You never know when you will get the decision. This insecurity permeates the entire judiciary. Brazilians do not complain that the judiciary decides wrongly, they complain about the time it takes to get a judicial ruling. In social and economic life we need an environment with predictability. (…)

[1] At stake is a court decision that may require that the country's banks pay billions of dollars to holders of savings accounts during the Collor (1990-1992), Bresser (1987) and Summer (1989) economic stabilization plans. According to the Brazilian Bank Federation (FEBRABAN), compensation payments could reach about US$150 billion, more than the net worth of the five largest banks. This would reduce banks' capital, jeopardize financial stability, and possibly require massive government intervention to recapitalize the banking system.